

**IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
GENERAL DIVISION**

LIBERTY INN,		CASE NO. 11CVF09-11083
Appellant,		JUDGE SHEERAN
vs.		
OHIO DEPT. OF HEALTH,		
Appellee.		

**DECISION AND JUDGMENT ENTRY AFFIRMING ADJUDICATION ORDER OF
OHIO DEPARTMENT OF HEALTH
AND
NOTICE OF FINAL APPEALABLE ORDER**

SHEERAN, J.

This case is a Revised Code 119.12 administrative appeal by Liberty Inn (Appellant), from an Adjudication Order issued by the Ohio Department of Health on August 8, 2011, imposing a \$2,500 civil fine on Appellant for its fifth or subsequent violation of Ohio's Smoke Free Workplace Act. For the following reasons, the Court concludes that the Adjudication Order must be affirmed.

Legislative Background

On November 7, 2006, Ohio voters passed a ballot initiative to enact the Smoke Free Workplace Act (Act). Codified in R.C. Chapter 3794, the Act became effective on December 7, 2006. The Ohio Department of Health (ODH) and its designees are charged with the enforcement of the Act. R.C. 3794.07. Subject to certain exemptions, proprietors of public places of employment are not to permit smoking in their establishments. R.C. 3794.02(A).

The Act provides that "[n]o proprietor of a public place or place of employment *** shall permit smoking in the public place or place of employment ***." R.C. 3794.02(A). Proprietors

of public places and places of employment are required to remove all ashtrays and receptacles used for disposing of smoking materials and to post “no smoking” signs at every entrance. R.C. 3794.06. Only private residences and certain family-owned and -operated places of employment, retail tobacco shops, outdoor patios, private clubs, and designated smoking rooms in hotels and nursing homes are exempt from the reach of the Act. R.C. 3794.03.

Facts and Procedural History

On October 1, 2010, the Butler County Health Department, as a designee of the Ohio Department of Health (ODH), received a complaint that Appellant had violated the Act by permitting smoking in its bar, located at 7163 Princeton Road, in Liberty Township, Ohio. *Transcript (T.) 9; State’s Exhibit (Ex.) F.* By letter dated October 1, 2010, the Butler County Health Department notified Appellant of the complaint, and that the Butler County Health Department had opened an investigation into the complaint. *Id.*

On November 5, 2010, Jennifer Gruesser, a Registered Sanitarian employed by the Butler County Health Department, conducted an inspection of Appellant’s bar. *T. 6-7, 9-10; State’s Ex. G.* Upon her arrival at the bar, Ms. Gruesser smelled and saw smoke, and observed two patrons holding lit cigarettes and smoking them at the bar. *T. 11-12, 17, 19, 21, 25; State’s Ex. G.*

Ms. Gruesser spoke to the bartender, a female, and to the bar’s owner, Brian Rauch. *T. 12, 17-18, 21, 26.* Mr. Rauch told Ms. Gruesser that he understood the smoking laws, that he had “no smoking” signs posted in the bar, and that it was his practice to ask smokers to leave the bar to smoke. *T. 12, 15-17, 20.*

According to Mr. Rauch, about twenty minutes before Ms. Gruesser arrived at the bar, he and the bartender had instructed the two smokers to stop smoking. *T. 37-38.* However, at no time while Ms. Gruesser was in the bar did Mr. Rauch or the bartender ask the smokers to stop

smoking or take any other measure to stop them from smoking. *T. 12-13, 15.* Mr. Rauch and the bartender were within a few feet of the smokers. *T. 13, 18, 23.*

By letter dated November 10, 2010, the Butler County Health Department notified Appellant that Appellant had been found in violation of the Act on November 5, 2010, specifically, that it had been found in violation of R.C. 3794.02(A) and Ohio Adm. Code 3701-52-02(A), for smoking in a prohibited area. *T. 14; State's Ex. H.* Because it was Appellant's fifth or subsequent violation of the Act, the Butler County Health Department notified Appellant that it would receive a civil fine in the amount of \$2,500. *T. 14-15; State's Ex. H.*

On February 10, 2011, at Appellant's request, an Impartial Decision Maker conducted an administrative hearing on the alleged violation. Appellant and the Butler County Health Department were represented by counsel. The Butler County Health Department presented the testimony of Ms. Gruesser, and Appellant presented the testimony of Mr. Rauch and Kevin Roberts, a customer of the bar. Several exhibits were admitted into evidence.

By certified mail dated March 10, 2011, the Impartial Decision Maker issued a Report and Recommendation affirming the investigatory findings and sustaining the \$2,500 civil fine. On March 16, 2011, Appellant filed objections to the Report and Recommendation. In an Adjudication Order issued on August 19, 2011, the Director of ODH approved the Report and Recommendation, affirmed the findings of the investigation, issued a final finding of violation, and sustained the \$2,500 civil fine.

On September 2, 2011, Appellant appealed the Adjudication Order to this Court pursuant to R.C. 119.12.

Standards of Appellate Review

Revised Code 119.12, which governs this appeal, provides:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

“Reliable” evidence is dependable; that is, it can be confidently trusted. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 571 (1992). In order to be “reliable,” there must be a reasonable probability that the evidence is true. *Id.* “Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.* “Substantial” evidence is evidence with some weight; it must have importance and value. *Id.*

The Court’s obligation is to review the Adjudication Order issued by ODH to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Parker’s Tavern v. Ohio Dept. of Health*, 195 Ohio App. 3d 22, 2011-Ohio-3598, ¶9 (10th Dist.). Determining whether an agency order is supported by reliable, probative, and substantial evidence is essentially a question of the presence or absence of the requisite quantum of evidence. *Id.* In undertaking this hybrid form of review, this Court must give due deference to the administrative resolution of evidentiary conflicts. *Id.*, citing *Univ. of Cincinnati v. Conrad*, 63 Ohio St. 2d 108, 111 (1980).

Analysis

Revised Code 3794.02(A) provides:

*** No proprietor of a public place or place of employment *** shall **permit smoking** in the public place or place of employment or in the areas directly or indirectly under the control of the proprietor immediately adjacent to locations of ingress or egress to the public place or place of employment. (Emphasis added.)

Ohio Adm. Code 3701-52-09(A)(5) provides that the fine for a fifth or subsequent violation of the Act shall be \$2,500.

Appellant's first argument in support of this appeal is that Appellant did not "permit smoking" on November 5, 2010.

To prove a violation of R.C. 3794.02(A), the Butler County Health Department had to prove that Appellant permitted smoking on November 5, 2010. *Pour House, Inc. v. Ohio Dept. of Health*, 185 Ohio App. 3d 680, 2009-Ohio-5475, ¶¶18-20 (10th Dist.). A proprietor permits smoking when the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent patrons from smoking, such as by posting no-smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. *Id.* at ¶¶18-19.

On November 5, 2010, the bar's owner and the bartender observed two patrons smoking cigarettes at the bar, instructed them to stop smoking, and then did nothing further to stop the smoking for the next twenty minutes. When the inspector, Ms. Gruesser, arrived at the bar, the two patrons were still smoking their cigarettes. At no time during Ms. Gruesser's inspection did the bar's owner or the bartender ask the two smokers to stop smoking or take any other measures to stop them from smoking. Accordingly, there is reliable, probative, and substantial evidence that, on November 5, 2010, Appellant "permitted smoking" in the bar.

Appellant's second argument in support of this appeal is that the violation and the fine are invalid, because, Appellant asserts, the Butler County Health Department did not comply with Ohio Adm. Code 3701-52-08(D)(3), which provides that, "[p]rior to issuing a proposed civil fine for a violation of Chapter 3794. of the Revised Code and this chapter, the department's investigation shall include all investigation activities set forth in paragraphs (D)(2)(a) to

(D)(2)(d) of this rule.” Ohio Adm. Code 3701-52-08(D)(2)(c) provides that “an investigation may include but is not limited to *** [t]elephone or on-site interviews[.]”

Appellant contends that the Butler County Health Department did not conduct “interviews,” because Ms. Gruesser did not speak to anyone other than the bar’s owner and the bartender on November 5, 2010. “Interview,” however, is not defined by the Ohio Administrative Code. *Parker’s Tavern v. Ohio Dept. of Health*, 10th Dist. No. 10AP-968, 2011-Ohio-5767, ¶8. When a statute or regulation fails to ascribe a definition to a word used, courts resort to the common, everyday meaning of the word. *Id.* Pursuant to Webster’s Third New International Dictionary (1966), an “interview” is definite as “a meeting face to face: a private conversation; a formal meeting for consultation.” *Id.* Merriam-Webster’s Online Dictionary further defines an “interview” as a “meeting at which information is obtained (as by a reporter, television commentator, or pollster).” *Id.*

The Ohio Administrative Code does not describe who must be interviewed in an investigation. *Parker’s Tavern v. Ohio Dept. of Health*, 10th Dist. No. 10AP-968, 2011-Ohio-5767, ¶9. Thus, Appellant’s argument that Ms. Gruesser did not interview any of the bar patrons is not relevant. *Id.* Ms. Gruesser met with two individuals, face to face, during her investigation, had conversations with them in order to gather information, asked them questions, and received answers from them. The Court concludes that Ms. Gruesser’s communications with the bar’s owner and the bartender were sufficient to constitute “interviews” as the term is commonly used.

Appellant’s third, and final, argument in support of this appeal is that the Act is unconstitutionally vague because it does not provide sufficient notice to allow a person of ordinary intelligence to determine what must be done to comply with the Act. This argument has been rejected, however, by the Tenth District Court of Appeals, in *Jackson v. Bartec, Inc.*, 10th

Dist. No. 10AP-173, 2010-Ohio-5558, affirmed, *Wymyslo v. Bartec, Inc.*, 2012-Ohio-2187 (May 23, 2012).

Conclusion

Having considered the entire record on appeal, the Court finds that the Adjudication Order issued by the Director of the Ohio Department of Health on August 19, 2011, imposing a \$2,500 civil fine on Appellant for its fifth or subsequent violation of Ohio's Smoke Free Workplace Act, is supported by reliable, probative, and substantial evidence and is in accordance with law. The Adjudication Order is therefore **AFFIRMED**.

This is a final, appealable Order. Costs to Appellant. Pursuant to Civ. R. 58, the Franklin County Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry.

It is so **ORDERED**.

Electronically signed by:

JUDGE PATRICK E. SHEERAN

Copies to:

MARTIN E. HUBBELL, ESQ. (0074049), Counsel for Appellant, 304 E. Warren St., Lebanon, OH 45036

STACY HANNAN, AAG (0081094), CATHERINE J. CALKO, AAT (0086217), Counsel for Appellee, 30 E. Broad St., Fl. 26, Columbus, OH 43215

Franklin County Court of Common Pleas

Date: 06-08-2012
Case Title: LIBERTY INN -VS- OHIO DEPARTMENT HEALTH
Case Number: 11CV011083
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "Patrick E. Sheeran", is written over a circular, textured seal or stamp.

/s/ Judge Patrick E. Sheeran

Court Disposition

Case Number: 11CV011083

Case Style: LIBERTY INN -VS- OHIO DEPARTMENT HEALTH

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes